92-676

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

FRED T. WILBURN,
Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,
Respondent,

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an action for personal injuries by a railroad employee against his railroad employer under the Federal Employer's Liability Act was the trial court correct in holding as a matter of law there was no jury issue as to the employer's negligence where there was undisputed evidence the employer knew of the presence of a large dog which eventually attacked the employee and yet negligently assigned the employee to work alone in an unguarded and unprotected position exposing him to an attack by the dog resulting in his injuries?

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OPINIONS BELOW

Petitioner, Fred T. Wilburn, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit to review the judgment of that Court rendered on August 11, 1992, in Case No. 92-5028 (Appendix A). Said judgment affirmed the memorandum and order of the United States District Court for the District of New Jersey rendered April 6, 1989. Said memorandum and order sustained a motion for summary judgment filed by the respondent, Consolidated Rail Corporation.

JURISDICTION OF THE COURT

On August 11, 1992 the United States Court of Appeals for the Third Circuit entered judgment in favor of the respondent. Count One of the petitioner's complaint (R. 6) dismissed by the trial court on respondent's motion for summary judgment sets forth claims arising under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following.

Jurisdiction to review the said judgment, by writ of certiorari is accordingly conferred upon this Court by Title 28, U.S.C., Section 1254 which provides in portions pertinent to this review as follows:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

* * * * *

STATUTES INVOLVED

The statutes involved in this petition for review are certain sections of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following.

Section 51 of the Federal Employers' Liability Act, Title 45, U.S.C., provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE

This is an action originally brought by petitioner, Fred T. Wilburn, against the respondent, Consolidated Rail Corporation, as well as Melvin and Karen Washington for injuries suffered by petitioner while working as a railroad welder's helper performing track department work on the respondent's main tracks in Woodbury, New Jersey. Hereinafter, Fred T. Wilburn, will be referred to as "petitioner" and Consolidated Rail Corporation, will be referred to as "respondent".

During the afternoon of September 5, 1985, a large black labrador dog owned by the Washingtons wandered into the area where a welder also employed by the respondent and the petitioner were preparing to perform their work. The petitioner's supervisor, and his assistant, were aware of the presence of the dog and in fact, had petted the dog. (R.35-36).

Towards the end of the work day, while the welder was involved in welding some railroad track, the petitioner's supervisor, assigned the petitioner to leave

the welder and go to a nearby, but different location along the track in order to use a cutting torch to cut a piece of rail which was sitting too close to the track. (R.37).

The petitioner proceeded to this new location. While working unattended in a bent over position with his goggles down, cutting the rail with his cutting torch, the petitioner was attacked by the same black labrador dog observed earlier in the day on the respondent's property. (R.37-38, 44).

When the dog saw the petitioner working with the welding torch it began to bark, attacked the petitioner, and snapped at his leg, thereby causing the petitioner while fending off the attack to fall backwards onto a rail injuring his back. (R.37-38, 44-45). The welder who was also at the time of the attack now working unattended some distance from the petitioner was able to stop the attacking dog by throwing sticks and rocks at the animal. (R.45).

Complaint was filed on March 31, 1987, in the United States District Court for the District of New Jersey at Camden, New Jersey. (R.6). In petitioner's complaint he alleges that while employed by the respondent railroad on September 5, 1985, he was injured as a result of the respondent's negligence in failing to furnish a reasonably safe place to work, a safe and suitable means or method of performing his job, insufficient help to perform his job, a failure to adequately warn him of the impending danger of his position and failing to provide safe and suitable equipment with which to work. Said claims were alleged pursuant to the Federal Employer's Liability Act (hereinafter referred to as FELA).

On May 8, 1987, respondent's answer to petitioner's Complaint was filed. (R.11). In the answer the respondent admitted the jurisdictional allegations of the petitioner's complaint and admitted that petitioner was employed by the respondent on September 5, 1985. In addition to denying its negligence through various

affirmative defenses, the respondent raised the defense of contributory negligence.

In a second count in his complaint, the petitioner separately alleged that the dog's owners were negligent and in violation of New Jersey law in failing to take reasonable and necessary precautions to control their dog which attacked the petitioner while he was working for the respondent on September 5, 1985.

Respondent's motion for summary judgment was filed against the petitioner on November 14, 1988, pursuant to Rule 56(c), Federal Rules of Civil Procedure and was sustained by the trial court on April 6, 1989 by memorandum and order. (R.18). Petitioner's motion for reconsideration was denied by memorandum and order dated May 5, 1989. (R.23). Petitioner's action against the owners of the dog continued until December 16, 1991 when it was concluded by a Stipulation and Order of Dismissal, reserving all rights against the respondent and creating a final appealable order. (R.25). On January 9, 1992, a Notice of Appeal was filed with the trial court

appealing from the order entered in the action on April 6, 1989 granting summary judgment to the respondent as against the petitioner. (R.27). On August 11, 1992 the United States Court of Appeals for the Third Circuit entered a judgment affirming the granting of the respondent's motion for summary judgment.

REASONS FOR GRANTING PETITION

This case presents important questions concerning the consistent application of the appropriate judicial test for when a jury should be permitted to determine the negligence, or lack thereof, of a railroad employer under the FELA.

The decision rendered by the United States District Court for the District of New Jersey and affirmed by the United States Court of Appeals for the Third Circuit is in direct conflict with the opinion of the United States Court of Appeals for the Second Circuit in the substantially similar case of *Gallose v. Long Island Railroad Co.*, 878 F.2d 80 (2nd Cir. 1989).

The FELA is liberally construed to effectuate its purpose of benefiting and protecting railroad employees. *Sowards v. Chesapeake and Ohio Ry. Co.*, 580 F.2d 713 (4th Cir. 1978). The liberal purpose of the FELA must be kept in mind when confronting arguments which could restrict an employer's liability under this chapter. *Baker*

v. Baltimore & Ohio R. Co., 502 F.2d 638 (6th Cir. 1974). In accordance with this liberal construction, the standard for determining liability of a railroad under the FELA is whether any negligence of the respondent railroad played any part, "even in the slightest," in causing or contributing to cause injury to a petitioner employee. *Rogers v. Missouri-Pacific Railroad Co.*, 352 U.S. 500 (1957).

Under the FELA, issues must be submitted to the jury if there is evidence of "any probative value" showing some negligence of the railroad caused in any part the injuries for which damages are sought, "even if such a conclusion must necessarily be based upon speculation and conjecture." *Lavender v. Kurn*, 327 U.S. 645 (1946). The issue of the employer's negligence may be withdrawn from the jury only if there is a zero probability that the employer's negligence caused or contributed to cause the employee's injury. *Penhowic v. Erie Lackawanna Railroad Co.*, 430 F.2d 697 (3rd Cir. 1970).

In *Gallose, supra,* a jury was permitted to determine whether or not the mere knowledge of the presence of a large dog on the railroad employer's property required the employer to act to protect its employee from potential danger. In this case, the petitioner was denied jury determination under similar circumstances because the trial court, contrary to the liberal spirit and intent of the FELA, required proof of the railroad employer's knowledge of the vicious propensity of the dog.

In deciding *Gallose*, the United States Court of Appeals for the Second Circuit determined on June 26, 1989, shortly after the decision in this case, that when a railroad employee was injured when bitten by a dog brought to work by a fellow employee, there was an issue of whether or not the railroad had breached its duty to provide the bitten employee with a safe work place if the railroad had knowledge that the dog was on its premises and failed to take appropriate steps to inform or protect its employees. In so stating the Second Circuit

pointed out that the issue is not whether or not the railroad had knowledge of the vicious propensity of the dog. *Gallose, supra* at p.85.

Contrary to the Second Circuit in *Gallose*, the trial court in this case required petitioner to present evidence of the dangerous propensities of the dog which attacked him. The trial court herein stated as follows at p. 4 of its Memorandum and Order:

> "Plaintiff presents no evidence which would support an inference that Conrail was aware of the dangerous nature of the dog. On the contrary, deposition testimony indicates that the dog was even-tempered, playful, and had never before attacked anyone. Absent evidence of Conrail's awareness of the dog's dangerous nature, plaintiff cannot sustain his burden of proof on this issue."

(Appendix B).

In its opinion in *Gallose*, at page 85, the Second Circuit reasoned that while a railroad is not liable if it has no reasonable way of knowing that a potential hazard exists, it must take reasonable steps to investigate and inform and protect its employees when it learns or should

learn of a potential hazard, or it will be liable when injury occurs. Citing, *Mohn v. Marla Marie, Inc.*, 625 F.2d 900 (9th Cir. 1980). The court then applied law to facts and stated the following:

> "Here, we cannot say, as a matter of law, that a large dog, brought to the work place by an employee for protection, does not constitute a potential hazard in the work place unless it possesses vicious propensities. To the contrary, we think that a jury reasonably could have found that the mere presence of this german shepherd-mix dog, which weighed over 70 pounds and reached almost 5 feet tall when it stood on its hind legs, created a potential hazard at Gallose's place of employment. Accordingly, the issue before the jury should have been, not whether the LIRR knew that the dog had vicious propensities, but whether the LIRR knew or should have known that a large German Shepherd-mix dog was on the premises, and if so, whether an employer using reasonable care should have investigated further or taken other steps to inform and protect its employees.

Id. at 85. (Emphasis added)

Likewise, in this case the appropriate issue for the trial court was not whether the dog Magnum was known to the railroad as a vicious dog and therefore a potential

hazard to the petitioner, but whether or not the respondent, through its supervisors, with knowledge of the presence of a dog at a work place where its workers would be performing tasks which required their concentration while wearing goggles should have separated the petitioner and his co-worker and left them to work unattended, or should have continued its practice of providing a helper who in turn would have been in a position to not only protect the worker from approaching trains, but also protect from the potential hazard of a dog interfering and creating a hazard while the work was underway.

In *Gallose*, the issue of the railroad's negligence was left for the jury. In this case the same issue was taken away from the jury and decided by the trial court. If this totally irreconcilable decision by the United States District Court for the District of New Jersey is permitted to stand, the door will be open to serious erosion of federal statutory rights granted employees by the FELA. This will result in a serious denial of rights granted by

federal statutes which should be reviewed by this Court to ensure consistent results throughout the various federal and state jurisdictions where the issue arises as to what constitutes a jury issue under the FELA.

CONCLUSION

The effect of the trial court's decision to grant respondent summary judgment and the affirmation of that decision on appeal was to preclude lawful consideration by a jury of the negligence or lack thereof by a railroad employer under the FELA. This Court should grant certiorari, review the record, reverse the lower court and remand this case for a full trial on the merits.

Respectfully submitted,

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APPENDIX A

Judgment of the United States Court
of Appeals for the Third Circuit

(Rendered August 11, 1992)

No. 92-5028

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRED T. WILBURN
Appellant,

vs.

CONSOLIDATED RAIL CORPORATION;
MELVIN WASHINGTON; KAREN WASHINGTON
Appellee.

On Appeal from the United States District
Court For The District of New Jersey
District Judge: Hon. John C. Lifland

Submitted Under Third Circuit Rule 12(6)
July 30, 1992

Before: Becker, Mansmann and Nygaard,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED, and ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

/s/ R. Nygaard
Circuit Judge

APPENDIX B

Memorandum and Order of the United States District Court for the District of New Jersey

(Decided April 6, 1989)

Civil Action No. 87-1138

IN THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

FRED T. WILBURN
Plaintiff,

vs.

CONSOLIDATED RAIL CORP., MELVIN WASHINGTON AND KAREN WASHINGTON
Defendants.

Presently before the court is a motion by defendant Consolidated Rail Corporation (Conrail) for summary judgment pursuant to Fed.R.Civ.P. 56(c). Having reviewed the moving papers and heard oral argument, this court grants Conrail's motion for summary judgment.

FACTS

On September 5, 1985, plaintiff was employed by Conrail as a trackman and welder's helper. At approximately 8:00 p.m. plaintiff was engaged in cutting a piece of rail with an acetylene torch. The record indicates that plaintiff was aware of the presence of a dog who frequently roamed the area. The dog's owners, Karen and Melvin Washington (also defendants) testify that other trackmen routinely played with the dog. Plaintiff's affidavit indicates that his torch was not working properly and went out several times, causing a loud "popping" sound every time it went out. He alleges that the popping sound aggravated the dog and caused it to attack him, knocking him down and causing severe back and hip injuries. On March 31, 1987, plaintiff filed the instant complaint pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§51 et seq.

STANDARD OF REVIEW

Fed R. Civ. P. 56(c) provides that summary judgment may be granted when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Hersh v. Allen Prods. Co., Inc., 789 F.2d 230, 232 (3d Cir.1986); Lang v. New York Life Insurance Co., 721 F.2d 18 (3d Cir. 1983). In deciding whether an issue of material fact does exist, the court is required to view all doubt in favor of the non-moving party. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 (3d Cir. 1983), cert. denied, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984); Knoll v. Springfield Township School District, 699 F.2d 137, 145 (3d Cir. 1983); Smith v. Pittsburgh Gage and Supply Co., 464 F.2d 870, 874 (3d Cir. 1972). The threshold inquiry is whether there are genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. Anderson

v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

DISCUSSION

> Under [FELA] the test of jury case is simply whether proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury ... It does not matter that, from the evidence, the jury may also, ... on grounds of probability, attribute the result to other causes ... Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to this single inquiry whether, with reason, [the] negligence, of the employer played any part at all in the injury...

Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 117 (1963). While FELA should be liberally construed by this Court to effectuate its underlying policy of compensating railroad employees for work-related injuries, it does not provide for strict liability. Lavender v. Kurn, 372 U.S. 645 (1946); Inman v. Baltimore & Ohio R.R. Co., 361 U. S. 138 (1960). Therefore, establishing a "reasonable foreseeability of harm is an essential ingredient of FELA negligence." Gallick at 117.

Plaintiff's burden is to "adduce reasonable evidence to show a breach of duty owed by the defendant to him in respect to the place where he was injured and that in whole or in part injuries resulted proximately therefrom." Delaware, L. & W.R. Co. v. Koske, 279 U.W. 7, 11 (1929). The duty owed to plaintiff is that a reasonable or ordinary care. Id. "Events which are too remote to require reasonable precaution need not be anticipated." Brady V. Southern R.R. Co., 320 U.S. 476, 483 (1943).

Plaintiff argues that Conrail should be liable because it failed to provide him with a reasonably safe place to work. Specifically, plaintiff asserts that Conrail should have known of the dangerous character of the dog and that Conrail was negligent when i supplied him with a defective torch. The general rule applicable to this case is as follows:

> Whenever facts are disputed or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences. Only where thee is a complete absence of probative facts to support the conclusion reached does reversible error appear.

Lavender v. Kurn, supra. at 653.

Plaintiff presents no evidence which would support an inference that Conrail was aware of the dangerous nature of the dog. On the contrary, deposition testimony indicates that the dog was even-tempered, playful, and had never before attached anyone. Absent evidence of Conrail's awareness of the dog's dangerous nature, plaintiff cannot sustain his burden of proof on this issue.

Plaintiff does present evidence which could support an inference that Conrail supplied him with a defective torch. However, plaintiff does not present evidence, circumstantial or direct, which supports an inference that the popping noises emanating from the allegedly defective torch caused the dog to attack his leg. Nothing but speculation ties the popping noise to the dog's attack on plaintiff.

Plaintiff's belief that popping noises "attracted and aggravated the dog", as set forth in paragraph 6 of his affidavit, is not sufficient, at this late state of the case, to withstand a motion for summary judgment. Accordingly,

IT IS on this 5th day of April, 1989, ORDERED that Conrail's motion for summary judgment is granted.

/s/ John C. Lifland
United States District Judge

Supreme Court, U.S.
FILED
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No. 92-676

In The

Supreme Court of the United States

October Term, 1992

FRED T. WILBURN,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this personal injury action by plaintiff-petitioner, a railroad employee, against the defendant-respondent, Consolidated Rail Corporation, under the Federal Employers Liability Act, Title 45, U.S.C., Sections 51 and following, did the trial court commit error by granting the Respondent's motion for summary judgment pursuant to rule 56(c) of the Federal Rules of Civil Procedure?

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STATUTES AND RULES INVOLVED

Respondent hereby adopts by reference the statements set forth in petitioner's brief with the addition of the following:

Federal Rules of Civil Procedure, 56. Summary Judgment

a. Does not apply.

b. Does not apply

c. Provides in pertinent part:

> . . . [summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

d. Does not apply.

e. Does not apply.

f. Does not apply.

g. Does not apply.

STATEMENT OF THE CASE

On March 31, 1987, the plaintiff, Fred T. Wilburn, filed a Complaint seeking damages for injuries allegedly sustained on September 5, 1985.[1]

---

[1] In deciding whether an issue of material fact does or does not exist, the court is required to resolve all doubt in favor of the

The plaintiff was employed as a trackman with the defendant/respondent, Consolidated Rail Corporation (hereinafter "Conrail"). On the date of this incident, the plaintiff was acting as a welder's helper. (R. 33). He was assigned that day to assist Jay "Chicken Leg" Hunter, who was a senior qualified welder. (R. 34). They were working around Barbour Street in Woodbury, New Jersey. (R. 34). By his own admission, the plaintiff was acting as a welder's helper, which involved looking out for Mr. Hunter, getting tools, etc. (R. 34-35).

"Chicken Leg" Hunter likewise testified that one of the responsibilities of a welder's helper is to watch for the welder or act as a flagman. (R. 41-43).

At approximately 8:00 p.m., the plaintiff was bent over cutting a piece of rail when a dog (allegedly co-defendant's black Labrador) snapped at him and bit him on the right leg (without breaking the skin). (R. 37, 39). In backing away from the dog, the plaintiff tripped and fell striking his back on a railroad rail. (R. 37). Mr. Hunter was at work welding when he heard the commotion of the purported canine attack. (R. 43, 47).

The dog had apparently been observed about the area earlier in the day. (R. 35). However, there was no unruly, mischievous or vicious behavior on the dog's part. In fact, the dog appears to have acted very much the

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non-moving party. *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir. 1983), *cert. denied* 465 U.S. 1091 (1984); *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972). Therefore, although respondent disputed the plaintiff's version of events, for purposes of the motion for summary judgment his testimony was accepted as true.

part of "Man's Best Friend." The plaintiff has said of his prior sightings of the dog, "He was a friendly dog." He was not observed behaving in an unfriendly manner. (R. 36-37)

On May 3, 1988 the case was submitted to arbitration. The arbitrator rendered an award specifically finding no negligence on the part of respondent. (R. 17).

Thereafter, on November 14, 1988, Respondent filed a motion for summary judgment which was granted by the trial court on April 6, 1989 by memorandum and order. (R. 18). Petitioner moved for reconsideration which was denied by memorandum and order dated May 5, 1989. (R. 23). On December 16, 1991, petitioner's action against the dog owners was concluded by stipulation and order of dismissal, reserving all rights as against the respondent. (R. 25). Petition appealed to the United States Court of Appeals for the Third Circuit. Said court affirmed without opinion the trial courts granting of respondent's motion for summary judgment.

Petitioner Fred R. Wilburn now seeks review based on what he characterizes as inconsistent applications of the appropriate judicial test for when a jury should be permitted to determine the negligence, or lack thereof, of a railroad employer under the FELA. Petitioner maintains that the decision rendered in this case by the United States District Court for the District of New Jersey and affirmed by the United States Court of Appeals for the Third Circuit is in direct conflict with the opinion of the United States Court of Appeals for the Second Circuit in the case of *Gallose v. Long Island R. Co.*, 878 F.2d 80 (2nd

Cir. 1989). This contention is meritless as there are substantial factual differences between the two cases. Furthermore, in the case at hand, no opinion was ever published by the United States Court of Appeals for the Third Circuit, therefore, there can be no conflict between the Courts of Appeal.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS THE APPROPRIATE STANDARD OF REVIEW WHEN NO MATERIAL QUESTIONS OF FACT EXIST.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> . . . [summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a mater of law.

See also, Hersh v. Allen Products. Co., Inc., 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118 (3d Cir. 1983). The mere existence of factual issues where those issues are not material to claims before the court will not suffice to defeat a motion for summary judgment. *Jersey Central Power & Light Co. v. Lacey Tp.*, 772 F.2d 1103, 1109 (3d Cir. 1985). The issue in dispute must be outcome determinative under the applicable law. *Id.*

The threshold inquiry of determining whether there is a need for trial, is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Summary judgment may be granted if the evidence favoring the non-moving party is merely colorable or is not significantly probative. *Id.* One of the principal purposes of the summary judgment rule is to isolate and dispose factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Thus, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof. *Id.*

POINT II

THE FEDERAL EMPLOYER'S LIABILITY ACT DOES NOT IMPOSE LIABILITY UPON AN EMPLOYER RAILROAD ABSENT A SHOWING OF NEGLIGENCE.

The plaintiff has brought the present action against Conrail under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 *et seq.* Section 51 of the Act provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part

> from the negligence of any of the officers, agents, or employees of such carrier . . .

The FELA imposes liability upon an employer to pay damages for injury due "in whole or in part" to its negligence. The question is whether there is any evidence that any employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence played any role in producing the harm. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 116 (1963). Whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion can be drawn that negligence of the employer played any part at all in the plaintiff's injury. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506-507 (1957).

But, while there is a considerably relaxed standard of proof in FELA cases, the Act does not provide for strict liability against employers nor make them insurers of employees' safety. *See Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959); *Thomas v. Grigorescu*, 582 F.Supp. 514 (S.D.N.Y. 1984), *aff'd mem.* 751 F.2d 371 (2d Cir. 1984); *Nivens v. St. Louis Southwestern Ry. Co.*, 425 F.2d 114 (5th Cir. 1970), *cert. denied* 400 U.S. 879 (1970); *Foote v. Erie Lackawanna Ry. Co.*, 142 N.J. Super. 195 (App. Div. 1976); *Ottley v. St. Louis–San Francisco Ry. Co.*, 360 Mo. 1189, 232 W.2d 966 (1950). Before a recovery can be had, there must be a showing by either direct or circumstantial evidence that the railway company was negligent. *Illinois Cent. R. Co. v. Skaggs*, 240 U.S. 66 (1916). *See also, New Orleans, N.E.R. Co. v. Harris*, 247 U.S. 367 (1918). The mere fact of injury will not warrant a recovery; there must be some negligence on the part of the railroad company or on the part of some employee as the basis for liability. *San*

Antonio & A.P. R. Co. v. Wagner, 241 U.S. 476 (1916). *See also, Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943); *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U.S. 587 (1929). There must also be a showing that negligence on the part of the employer was a proximate cause of the employee's injury. *See Moody v. Maine Central R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987).

Absent some sort of statutory violation by the railroad, the long established principles of negligence apply. *See Pratico v. Portland Terminal Co.*, 783 F.2d 255, 262 (1st Cir. 1985). The measure of duty owed to an employee under the FELA is that of reasonable and ordinary care. *Delaware L. & W.R. Co. v. Koske*, 279 U.S. 7 (1929). The employer is bound to do what a reasonable and prudent man would ordinarily do under the circumstances. *Anderson v. Atchison, T. & S.F. Ry. Co.*, 333 U.S. 821 (1948).

Under the FELA, the railroad is obligated to provide its employees with a reasonably safe place to work. *Padgett v. Southern Ry. Co.*, 396 F.2d 303 (6th Cir. 1968). However, the railroad is not obligated to eliminate all risks in the workplace; it is only obligated to eliminate unreasonable risks. *See Ragsdell v. Southern Pac. Transportation Co.*, 688 F.2d 1281 (9th Cir. 1982); *Tobin v. Nat'l R. Passenger Corp.*, 677 F.Supp. 674 (D.Mass. 1988). The diligence required of an employer to furnish employees with a safe place to work is commensurate with the dangers reasonably apprehended. *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5th Cir. 1951). A railroad is not required to anticipate and guard against unexpected and improbable dangers to employees. *Morey v. Maine Cent. R. Co.*, 127 Me. 190, 142 A. 585 (1928). Events which are too

remote to require reasonable provision need not be anticipated. *Brady, supra.*

The plaintiff in an FELA action must establish the "reasonable foreseeability of harm." *Gallick, supra,* at 117. A railroad is not liable for failing to provide a safe workplace if it has no reasonable way of knowing that the potential hazard exists. *Beeber v. Norfolk Southern Corp.,* 754 F.Supp. 1364, 1368 (N.D. Ind. 1990) (citing *Gallose v. Long Island R. Co.,* 878 F.2d 80, 85 (2d Cir. 1989)

The trial court found, and the appellate court affirmed, that plaintiff had presented no evidence that would support even an inference that Conrail was aware of any danger presented by the dog. (R. 21). To the contrary, deposition testimony from the plaintiff himself established that the dog in all earlier contact had been even-tempered and playful. In essence, the trial court found as a matter of law that plaintiff had not established the "reasonable foreseeability of harm," or in other words, that Conrail had any reasonable way of knowing that the dog constituted a potential hazard. The plaintiff himself described the dog before the alleged attack as a "friendly dog". (R. 36).

The FELA is basically predicated upon negligence. *O'Donnell v. Elgin, J.& E. R. Co.,* 338 U.S. 384, 391 (1949). This means that if there is no statutory violation, traditional negligence principles apply. *Pratico, supra.* In New Jersey, the common law was that owners of domesticated animals, such as dogs, were liable only if they had *scienter,* i.e. knowledge of the animal's dangerous or mischievous propensities. *DeRobertis by DeRobertis v. Randazzo,* 94 N.J. 144, 150 (1983). One not an owner of a vicious dog

may be liable as a keeper or joint owner, if he has such knowledge if its vicious disposition. *Mascola v. Mascola*, 168 N.J. Super. 122, 127 (App. Div. 1979). The trial court's ruling was thus consistent with the long-established principle that a non-owner of a dog cannot be held liable without prior knowledge of the dog's vicious propensities. There is no basis in the FELA to hold a railroad to a higher standard of care.

POINT III

THE COURT'S DECISION IN THE MATTER AT HAND IS NOT INCONSISTENT WITH THE COURT'S DECISION IN *GALLOSE*. THUS CERTIORARI SHOULD BE DENIED.

Certiorari should not be granted except in those cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion or authority between courts of appeal. *Rice v. Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955) quoting *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L.Ed. 712 (1923). Here, not only is there not a real and embarrassing conflict between court of appeal, there is not conflict whatsoever.

The Plaintiff relies upon *Gallose, supra*, which was decided after the trial court's decision on Conrail's summary judgment motion. The facts of that case differ materially from those involved in the case *sub judice*. In *Gallose*, plaintiff's co-employee brought a large German shepherd-mix dog to the workplace, where it remained in

a bathroom until its escape and attack upon plaintiff. The dog in that case was on the employer's premises from the time the plaintiff's co-employee brought it to work until the attack. In the present case, the dog had been in the area earlier, but there is no evidence Conrail had knowledge that it was in the area immediately before its alleged attack upon plaintiff. Furthermore, in *Gallose*, the plaintiff was apparently unaware of the presence of the dog at the workplace, thus raising the issue of the employer's negligence in failing to inform its employees of the dog's presence. To the contrary, the plaintiff here was aware of the dog being in the area during the day and, therefore, had the same information as his employer.

Under the circumstances, it would be unreasonable to impose upon Conrail a duty to anticipate the dog's alleged attack. The plaintiff asserts that Conrail should have furnished him with a lookout. However, the plaintiff himself was a welder's helper whose duties included acting as a lookout for the welder. Essentially, the plaintiff claims Conrail should have provided a helper for the welder's helper, or a welder's helper's helper. It is not clear how an extra helper would have prevented the alleged sudden attack, since no one had any reason to suspect such behavior from the dog.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that this court should deny *certiorari* as summary judgment was correctly granted in the trial court, no conflict exists between the United States Court of

Appeals for the Second Circuit and the United States Court of Appeals for the Third Circuit, and petitioner has failed to present a substantial question for review of the Supreme Court of the United States of America.

Respectfully submitted,

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